

STATE OF MICHIGAN
COURT OF APPEALS

DOROTHY M. BAKER,

Plaintiff-Appellee,

v

GERALD A. BAKER,

Defendant-Appellant.

UNPUBLISHED

April 21, 2015

No. 320463

Bay Circuit Court

LC No. 12-003821-DO

Before: O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce following a bench trial. We affirm.

The parties were married 22 years before plaintiff-wife filed for divorce in November 2012. At the time of the bench trial, plaintiff was 63 years old and defendant-husband was 62 years old. During their marriage, plaintiff took care of the parties' home and worked part-time as a licensed practical nurse for approximately 11 years, but had not worked outside the home since 2010. She receives \$563 a month in social security and, during the proceedings, was awarded \$3,000 a month in temporary spousal support. Defendant had worked at Consumers Energy for 37 years, and had no immediate plans to retire. His 2012 earnings were \$132,490.86, and his net pay was approximately \$4,387 every two weeks.

Before the bench trial, the parties entered into a stipulated property settlement. Plaintiff received as separate property inheritances she had received, as well as a roughly equal division of the parties' assets. Upon finalization of the divorce, plaintiff would receive approximately \$440,000 in cash and certificates of deposit (CDs) from the division of the marital assets. Two years after the divorce, she would also be eligible to draw on defendant's social security to receive additional funds, and upon defendant's retirement, she would receive her prorated portion of his pension. The issue below and on appeal was whether defendant should have to pay spousal support.

It is within the trial court's discretion to award spousal support, and we review a spousal support award for an abuse of discretion. *Loutts v Loutts*, 298 Mich App 21, 25; 826 NW2d 152 (2012). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Id.* at 26 (citation omitted). A trial court's factual findings regarding spousal support are reviewed for clear error. *Id.* "A finding is clearly erroneous if, after reviewing the entire record, we are left with the definite and firm conviction that a mistake

was made.” *Id.* “If the trial court’s findings are not clearly erroneous, we must determine whether the dispositional ruling was fair and equitable under the circumstances of the case. We must affirm the trial court’s dispositional ruling unless we are convinced that it was inequitable.” *Id.* (internal citations omitted).

“The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case.” *Id.* (citation omitted); see also MCL 552.23(1). A court should consider the following factors when determining whether to award spousal support:

(1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties’ ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties’ health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, and (12) general principles of equity. [*Loutts*, 298 Mich App at 31 (citation omitted).]

“The trial court should make specific factual findings regarding the factors that are relevant to the particular case.” *Id.* at 32 (citation omitted).

Defendant argues that the trial court abused its discretion in awarding spousal support. Defendant claims that in its decision, the trial court ignored several factors, including the amount of property awarded to the parties, the prior standard of living of the parties, the needs of the parties, and the contributions of the parties to the joint estate. Defendant makes several specific claims in support of his argument.

First, defendant claims that the trial court erred in regard to its decision and findings regarding the parties’ prior standard of living. Defendant asserts that undisputed evidence showed that the parties lived on \$1,500 per month while they were married. Defendant provided no evidence of this assertion, other than his testimony and plaintiff’s similar statement made to the Friend of the Court referee who heard her motion for temporary spousal support. At trial, plaintiff admitted having made the statement, but said \$1,500 had been an approximation, and that having to pay the bills on her own had given her a better idea of her expenses. While it is true that plaintiff acknowledged that the parties lived conservatively, she submitted evidence that her monthly expenses were higher than \$1,500 since separating from defendant. Plaintiff presented an itemized statement of her monthly needs, as well as a statement of the medical and pharmaceutical expenses she paid out-of-pocket from January 2013 until October 7, 2013. The court noted that plaintiff’s estimation was a little elevated because of medical expenses, but exercised its discretion and used the monthly estimation as the basis for its spousal support award. While we acknowledge that the parties’ station in life and accustomed standard of living may serve as a qualitative basis for a support award, we do not agree that, based on the evidence presented, the trial court abused its discretion. *Id.* at 25. Further, even if plaintiff was accustomed to live on less than \$1,500 a month, defendant cites no authority establishing that she

must continue to do so, especially when the evidence showed that her needs are greater and defendant testified that he has the ability to pay spousal support without impoverishing himself.

Defendant next asserts that there was no dispute that the marital wealth was accumulated by defendant, and, thus, the trial court erred in its determination regarding the contributions of the parties to the joint estate. While defendant may have provided the bulk of the parties' income, there was testimony that plaintiff worked until 2010, when the parties agreed that she would not look for another job in light of her health issues. After she stopped working, she testified that she took care of the parties' house, which included grocery shopping, cooking, cleaning, and yard work, among other responsibilities. The trial court's findings were consistent with this testimony. Thus, we do not agree that the trial court abused its discretion in regard to this factor. *Id.*

Third, defendant asserts that the assets awarded to plaintiff would provide plaintiff sufficient income to cover plaintiff's needs. Defendant's argument relates to both the amount of property awarded to the parties and the needs of the parties. According to defendant, plaintiff received significant assets including separate property, and the assets were sufficient to provide for plaintiff's claimed monthly expenses. In addition, defendant claims that the trial court improperly ignored testimony from plaintiff's expert witness Amy Geer, a certified public accountant (CPA), regarding the income that could be available to plaintiff if she were to invest the assets she was awarded.

We disagree with defendant's assertion regarding the property awarded to plaintiff in the property division. As defendant fails to acknowledge, this Court has held that a spouse is not required to dissipate property awarded to meet daily needs when spousal support can be made available. *Gates v Gates*, 256 Mich App 420, 437; 664 NW2d 231 (2003); *Hanaway v Hanaway*, 208 Mich App 278, 296; 527 NW2d 792 (1995). "[W]here both parties are awarded substantial assets, the court, in evaluating a claim for [spousal support], should focus on the income-earning potential of the assets and should not evaluate a party's ability to provide self-support by including in the amount available for support the value of the assets themselves." *Hanaway*, 208 Mich App at 296. Here, both parties were awarded significant assets in the property settlement, and we do not agree that plaintiff should be required to dissipate her share of the marital assets to provide for her monthly expenses. Defendant provides no legal authority to support his position. Further, we do not agree that plaintiff was awarded more assets than defendant based on her separate property, as defendant suggests.

In addition, the trial court did not abuse its discretion in refusing to credit defendant's expert witness testimony. In reviewing findings of fact by a trial court, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). Geer testified regarding the income-producing potential of plaintiff's property award. Geer's approach required plaintiff to invest her assets, and then to use part of her principal every month to meet her basic needs. On the other hand, plaintiff testified that defendant had never invested in stocks, bonds, mutual funds, or annuities, but had always kept his money in cash, a savings account, or CDs. Plaintiff was not comfortable investing her money, it would be difficult for her to do at this point in her life, and she preferred cash, savings accounts, and CDs, similar to defendant. The trial court did not clearly err in disregarding Geer's testimony in light of plaintiff's testimony. *Loutts*, 298 Mich App at 26. Moreover, again

plaintiff should not be made to use her assets to provide for her support when defendant is able to do so and in a manner which is inconsistent with the parties' historical practices. See *Hanaway*, 208 Mich App at 296; *Gates*, 256 Mich App at 437. Accordingly, the trial court's decision in this regard was not an abuse of discretion. *Loutts*, 298 Mich App at 25.

Defendant also asserts that the retirement savings awarded to plaintiff should be considered income because the parties are at the age of retirement. The assets received by plaintiff are not income-producing assets. See *Olson v Olson*, 256 Mich App 619, 632-633; 617 NW2d 64 (2003). Again, as Geer testified, plaintiff would have to invest the savings in order to create sufficient income for her needs. For the same reasons stated above, we do not agree that the trial court was required to adopt Geer's method, and, further, the trial court correctly focused on the income-earning potential of the assets and not the value of the assets themselves. *Hanaway*, 208 Mich App at 296.

Defendant next claims that the court did not assess plaintiff's income, which was \$563, or consider that her income will increase when defendant turns 65 and begins receiving payments from his pension. With regard to plaintiff's social security income, the court found that plaintiff received \$563 a month in social security income, and would be eligible for an increase when defendant turned 65. At that time, the court found, she would also be eligible for her prorated portion of defendant's pension. The court emphasized that defendant's retirement would bring changes sufficiently significant to revisit and possibly modify the spousal support award, and the court reserved spousal support for defendant, thus providing the opportunity for defendant to request spousal support if necessary. Thus, contrary to defendant's assertion, the record clearly indicates that the court did consider whose earnings contributed to the marital estate as well as the future social security and pension payments due to plaintiff.

In summary, we conclude that the trial court did not abuse its discretion. Overall, our review reveals that defendant does not actually dispute that that court's findings were factually inaccurate, but that the court did not use its findings to reach a favorable conclusion for defendant. The facts support an award of spousal support. Plaintiff and defendant had a long-term marriage and each received significant assets from the division of marital property. Given the fact that defendant works and plaintiff does not, the parties would have a significant disparity in post-divorce earnings. Without spousal support, plaintiff receives approximately \$563 a month in social security, and anticipates an increase after defendant turns 65, while defendant works fulltime and earns over \$100,000 a year. Plaintiff is not young, has medical issues, and cannot work because of her health. For all of these reasons, the trial court's decision to award plaintiff spousal support in the instant case does not fall outside the range of principled outcomes, and therefore cannot be said to be an abuse of discretion. *Loutts*, 298 Mich App at 25.

Affirmed. Plaintiff, the prevailing party, may tax costs. MCR 7.219.

/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood
/s/ Michael F. Gadola